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David S. Broder

Watergate Reform Act: 'Dangerous, Offensive'

Well, the congressional mountain has labored and brought forth a second Watergate mouse. The first landmark piece of legislation that resulted from the great scandal was the Federal Campaign Finance Act of 1974, which provided public financing of presidential campaigns and did other things supposedly guaranteed to cleanse the political process.

It was hailed in Congress and on the nation's editorial pages. But when the Supreme Court got around to examining the law, it decided that several of its key provisions were unconstitutional infringements on the freedom of speech.

A similar caution is in order on the near-unanimous praise being lavished on the Watergate Reorganization and Reform Act of 1976, which passed the Senate last week by a vote of 91-5 and is expected to have equally easy sailing in the House.

The five dissenters in the Senate were five of the more rigid conservatives in that body—Carl Curtis, Paul Fannin, Roman Hruska, Paul Laxalt and William L. Scott. Hardly a commentator to the left of Pat Buchanan would willingly enlist in such company.

But I am going to ignore the proprieties and say plainly what I think—that the main provision of the bill is offensive, deceptive and dangerous, and that, once again, Congress has avoided the opportunity to come to grips with the real problems of Watergate.

That bill creates a permanent Independent Office of Special Prosecutor within the Department of Justice, to be headed for a single three-year term by someone appointed by the President and confirmed by the Senate. The prosecutor will have jurisdiction to investigate and prosecute any possible violations of federal criminal law by the President, Vice President, senior administration officials, members of Congress and the judiciary.

One thing that is offensive about the bill is the proviso that the special prosecutor cannot be anyone who, in the previous five years, held a "high-level position of trust and responsibility" in a political party or the personal organization of any candidate for federal office. For good measure, Sen. Lloyd Bentsen amended the bill to put the same prohibition on anyone appointed Attorney General or Deputy Attorney General.)

I do not know what word except "contempt" expresses my attitude toward a set of practicing politicians who accept as valid the premise that anyone affiliated with politics is automatically unfit to conduct one of the highest responsibilities of government—the administration of justice.

If politicians can't be trusted to administer justice, then why in the world should we trust them to collect taxes, or provide for the national defense, or decide whether our children fight in a war? Why not be consistent and say that no one connected with politics should serve in public office?

The dangerous notion in the bill is the assumption that the safety of our republic lies in finding non-political "good men," who can be trusted with powers we would not trust to politicians.

That is an absolute perversion of the doctrine of the American Constitution. Such men of perfect virtue are as rare as Plato's "philosopher-kings." In real world terms, a lawyer with a three-year non-renewable charter to investigate anything of importance in the upper levels of all three branches of the American government would be under enormous pressure to find things to prosecute. As Sen. Sam Nunn said, "He wants trophies for his wall when he's through." It is the perfect launching pad for the ruthless demagogue's political career.

"The special prosecutor, under this law, is accountable to no one."

Rather than depending on godlike virtue in public servants, the American Constitution protects freedom by holding officials accountable for their actions.

But the special prosecutor, under this law, is accountable to no one. He reports annually to committees of Congress but can be removed by the President only "for extraordinary improprieties, for malfeasance in office or for any conduct constituting a felony." For all practical purposes, he is a free agent, exercising extraordinary vwer without check. He is, in short, the very kind of official which Watergate should have warned us against.

What is deceptive about this scheme is well-explained by Professor Philip B. Kurland of the University of Chicago, in a letter printed as part of the debate of the bill.

"You have certainly misconstrued history," he wrote the senators, "if the concept of a special prosecutor is based on the notion that the Watergate special prosecutor contributed to the discovery and remedy for the Watergate abuses." The press and two congressional committees did that work of exposure and "the special prosecutor undertook criminal prosecutions of those malefactors."

That is the proper division of labor, Kurland said, but the bill's proposed "utilization of special prosecutors at a stage prior to criminal trial is once again an evasion of congressional responsibility . . . Every time an important governmental problem has arisen in recent decades, Congress has pusillanimously delegated the treatment of the ailment to someone else. Thus, the proposed public prosecutorial scheme . . . is only another symptom of the Watergate syndrome, rather than a contribution toward its elimination."

Instead of passing such showboat legislation, Congress could be employing its constitutional powers to judge and expel those of its own members who have been charged with almost every kind of abuse of power and breach of law. It can also investigate alleged improprieties in the Executive Branch.

But that is the difficult course of political responsibility, so Congress prefers to pass the buck to a non-political special prosecutor. If this scheme comes to pass, we can all recall what the English said at the time of Cromwell: Lord protect us from Protectors.

FROM

Central Intelligence Agency

Washington, D.C. 20505

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TO: Ms. Hilda Schreiber
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27 July 1976

Hilda:

Attached is the "one pager" on our suggested amendments to the President's substitute bill for S. 495.

STATINTL

[redacted]

Office of Legislative Counsel

FORM 6-68 1533 OBSOLETE PREVIOUS EDITIONS

(40)

Explanation of Amendments

I. Amend Section 304(a)(3) by inserting after the words "an undercover agent of the Federal Government," the following language:

> "or ~~in any manner~~ otherwise jeopardize the intelligence activities of such agencies or contravene existing law with respect to the disclosure of information contained in such reports."

Explanation: Many persons in the Government, especially intelligence personnel, have access to highly sensitive information which would be extremely valuable to a foreign intelligence service and for which foreign services have and would offer large sums of money. Attempts have been made by foreign intelligence services to recruit such employees. The disclosure of the financial status of such personnel would clearly assist the intelligence services of other countries in identifying employees for possible recruitment approach. This consideration applies to all personnel in national security-related areas whether or not they are undercover intelligence personnel. As concerns the CIA, Congress has recognized that the Agency's ability to accomplish its unique mission could be jeopardized by the public disclosure of the names and certain other information concerning any of its employees. Accordingly, section 7 (now section 6) of the CIA Act of 1949 (50 U.S.C. 403g) states as follows:

> "In the interests of the security of the foreign intelligence activities of the United States and in order further to implement the proviso of section 403(d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the Agency shall be exempted from the provisions of any ... law which require(s) the publication or disclosure of the organization, functions, names, official titles, salaries, or numbers of personnel employed by the Agency...."

II. Amend Section 306(a)(2) by inserting after the words "in career positions," the following language:

> "or individuals exempted under Section 304(a)(3)."

Explanation: The protection afforded certain intelligence personnel by the exemption in Section 304(a)(3) permitting them to file reports with their agency head rather than the Civil Service Commission would be vitiated if the agency heads were required to make these reports public under Section 306(a)(1). The proposed amendment to Section 306(a)(2) is therefore necessary to effectuate the exemption in Section 304(a)(3).